FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 17 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 596

ASHBY O. STEWART, Executor of the Last Will and Testament of Mary W. Stewart, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

GEORGE H. KOSTER,
300 Montgomery Street,
San Francisco 4, California,
Attorney for Petitioner.

RICHARD W. GRAHAM,
300 Montgomery Street,
San Francisco 4, California,
Of Counsel.

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	7
Conclusion	11
Appendix A—Opinion of the Court of Appeals	1
Appendix B—Judgment of the Court of Appeals	17
Appendix C—Opinion of the Court of Appeals on rehearing	19
Appendix D—Statutes involved	24
Appendix E—Decision of the Superior Court, County of San Diego in Estate of Mendenhall, No. 56225	31

Table of Authorities Cited

Cases	Pages
Estate of Mendenhall, San Diego Superior Court No. 56225	6, 7, 8
Rhodes v. Comm., 41 B.T.A. 62, aff'd (CA-8, 1941), 117 Fed. 2d 509	9
U. S. v. Waechter (CA-9), 195 F.2d 963	7, 10

Rules	
Rules of the Supreme Court of the United States, Rule 19	8

Codes

	Pages
Civil Code of California, Sections 161a, 164, 172	3
Internal Revenue Code of 1939:	
Sections 810, 811(a), (c) and (d) (26 U.S.C., 1952 ed., Sections 810, 811)	3, 5
Section 810	8
Section 811(a)	6, 9
Section 811(b) through (g)	9
Section 811(c)(1)(B)(i)	6
Section 811(e)	9
Internal Revenue Code of 1954, Sections 2034 through 2042	9
Probate Code of California, Section 201	3
28 U.S.C.:	
Section 1254(1)	2
Section 1346(a)(1)	3

Texts

Beverage, Law of Federal Estate Taxation (Callaghan & Co., 1956), Section 4.02, p. 129	9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

ASHBY O. STEWART, Executor of the Last Will and Testament of Mary W. Stewart, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 18, 1959, insofar as said judgment reverses the judgment of the United States District Court for the Northern Disfriet of California, Southern Division.

OPINIONS BELOW.

The opinion of the District Court (R. 34-49) is reported at 158 F. Supp. 25. The opinion of the Court of Appeals (R. 67-77) is reported at 270 F.2d 894, and is set forth in the Appendix at pages 1-16. The opinion of the Court of Appeals on a petition for rehearing (R. 80-82) is reported at 270 F.2d 903, and is set forth in the Appendix at pages 19-23.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on June 18, 1959 (R. 78), and is set forth in the Appendix at pages 17, 18. A petition by petitioner herein for a rehearing was denied on September 28, 1959 (R. 79-82). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED.

Whether the interest of a wife in insurance policies on the life of her surviving husband, which interest arises solely from the use of community property funds for the payment of premiums thereon, is upon her death the subject of a taxable transfer under the federal estate tax laws, notwithstanding the rule of local law that she has no interest in such policies which passes from her by will or by succession.

STATUTES INVOLVED.

Internal Revenue Code of 1939, Secs. 810, 811(a), (c) and (d) (26 U.S.C., 1952 ed., Secs. 810, 811);

Civil Code of California, Secs. 161a, 164, 172;

Probate Code of California, Sec. 201.

The above statutes are set forth in the Appendix at pages 24-30.

STATEMENT.

This action was brought by petitioner in the District Court for recovery of federal estate taxes, and was tried entirely on the pleadings and a written stipulation of facts (R. 34). Jurisdiction was conferred on the District Court by 28 U.S.C. Sec. 1346(a)(1).

Three issues were presented to the District Court (R. 53). One issue (First Count) was conceded by the Government. A second issue (Second Count) was decided by the District Court partly in favor of the taxpayer and partly in favor of the Government (R. 54), and this determination was affirmed in its entirety by the Court of Appeals (R. 77, 78). No review is sought of the Court of Appeals' judgment insofar as this affirmation is concerned.

The District Court decided the third issue (Third Count) in favor of the taxpayer (R. 55), but this determination was reversed by the Court of Appeals (R. 77, 78), and review is now sought of this reversal. The factual setting for this issue can be summarized as follows:

A. O. Stewart and Mary Stewart were married in 1906 and their marital relationship continued until Mary's death on February 21, 1951. They were residents of California at all times pertinent to this case (R. 25, 34-35).

At the time of Mrs. Stewart's death, there were twenty-six insurance policies outstanding, covering the life of her surviving husband, all of which had been purchased by the payment of premiums out of the community property funds of Mr. and Mrs. Stewart (R. 29). No part of the value of these policies was reported in the U. S. Estate Tax Return for the estate of Mary W. Stewart. On audit of that return the Commissioner of Internal Revenue determined that one-half of the $751,178.85 cash value of these policies as of the date of the decedent's death should be included in her gross estate, and a deficiency based on this determination was assessed and paid (R. 29, 30). A claim for refund was filed and rejected and this action was brought in the United States District Court for recovery of the amount so paid (R. 10, 23, 30).

The insurance policies themselves were attached as exhibits to the stipulation of facts in this action and were made a part of the record on appeal to the Court of Appeals, although they were not printed (R. 64), and are therefore not a part of the transcript of record filed with this petition (R. 83).

The policies were in the customary form and the following is a summary tabulation of the pertinent rights thereunder:

Policies Under Which Wife Was Named Primary Beneficiary, and Others Named as Contingent Beneficiaries		Designation of Beneficiary Consented to by Wife		Right to Change Beneficiary or Surrender Policy Retained by Husband	
Number of Policies	Name of Insurer	Yes	No	Yes	No
1	Pacific Mutual		X	X	
1	Aetna		X	X	
8	Equitable	X		X	
2	Travelers	X		X	
1	Massachusetts Mutual	X		X	
2	Mutual of New York*		X	X	
2	Equitable	X		X	
3	New York Life	X			X
1	John Hancock	X			X
2	Aetna		X	X	

*Could not take cash surrender value.

Policies Under Which Daughter or Grandchildren Were Named Primary Beneficiaries, and Wife Named as Contingent Beneficiary		Designation of Beneficiary Consented to by Wife		Right to Change Beneficiary or Surrender Policy Retained by Husband	
Number of Policies	Name of Insurer	Yes	No	Yes	No
2	Mutual Benefit		X	X	
1	West Coast		X	X	

The Government's postion on this issue has been that Mrs. Stewart's community property interest in these policies was includible in her gross estate under Sec. 811(a), (c) or (d) of the Internal Revenue Code of 1939 (R. 45).

The District Court concluded that her interest in the policies was in effect only a right of protection; that is, a right during her lifetime to object in the event more than half the proceeds were paid to a stranger on Mr. Stewart's death without her consent (R. 48, 49). The Court held that this right was extinguished when she predeceased her husband and that, however such a right might be classified, there